

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HONORABLE RICHARD B. SANDERS,
as Justice of the Washington Supreme
Court,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

NO. 80393-5

EN BANC

Filed May 14, 2009

THOMPSON, J.*— Justice Richard Sanders seeks review of the Court of Appeals decision that the State has no duty to defend him or to reimburse him for attorney fees he incurred in defending himself before the Commission on Judicial Conduct. At issue is whether the State is required to defend a judge who is alleged to have committed an ethics violation while otherwise within the purview of his or her official duties.

We affirm the Court of Appeals, holding the State has no duty to defend when a judge knows or should know that the conduct of which he or she is accused is unethical and therefore not an official act.¹

* Judge Donald H. Thompson is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

¹ We affirm the result but choose not to consider the grounds upon which the Court of Appeals based its decision.

FACTS

Justice Sanders toured the Special Commitment Center (SCC)² at McNeil Island Corrections Center on January 27, 2003. Soon after his visit, a complaint was filed with the Commission on Judicial Conduct (Commission), alleging Justice Sanders had communicated with SCC residents who had cases pending before the Washington Supreme Court.

While the Commission was investigating the complaint, Justice Sanders made a request to the attorney general for legal representation under RCW 43.10.030 and .040. The request was denied, deferring determination of the judge's eligibility for a public defense until Commission proceedings concluded. Justice Sanders retained private counsel at his own expense.

In April 2004, the Commission determined that probable cause existed to believe Justice Sanders had violated the Code of Judicial Conduct. Justice Sanders then brought a declaratory judgment action in Thurston County Superior Court, seeking to require the State to defend him. The superior court denied the parties' cross-motions for summary judgment, ruling there was a material issue of fact as to whether Justice Sanders had committed willful misfeasance. The Court of Appeals granted Justice Sanders' motion for discretionary review of the superior court's ruling.

While review was pending in the Court of Appeals, the Commission issued its

² The SCC provides mental health treatment for civilly committed sex offenders who have completed their prison sentences.

decision that Justice Sanders had violated Canon 1 of the Code of Judicial Conduct by failing to enforce high standards of judicial conduct³ and Canon 2(A) by failing to promote public confidence in the integrity and impartiality of the judiciary.⁴ The Commission imposed the sanction of admonishment.⁵ Justice Sanders appealed the Commission's decision.

Meanwhile, the Court of Appeals granted a motion by Justice Sanders to stay its review of the declaratory judgment action in order to allow the superior court to apply the Commission's findings. In the superior court, Justice Sanders sought to obtain information about how the State had interpreted its duty to defend other state officials. The State moved to quash Justice Sanders' discovery requests and to stay the superior court proceedings until the Supreme Court ruled regarding the

³ Judges shall uphold the integrity and independence of the judiciary:

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 1.

⁴ Judges should avoid impropriety and the appearance of impropriety in all their activities:

Judges should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 2(A).

⁵ Admonishment is the Commission's least severe disciplinary action.

Commission's decision.⁶ The superior court granted the stay.

The Court of Appeals then granted Justice Sanders' motions to lift its earlier stay and to extend discretionary review to include the superior court's stay order.

The court held that under chapter 42.52 RCW, "the attorney general has the discretion to decline representation, subject to a duty to reimburse a judge for defense costs in the event that the Commission later dismisses the charges or exonerates the judge of all violations of the Canons." *Sanders v. State*, 139 Wn. App. 200, 202, 159 P.3d 479 (2007). Because Justice Sanders was determined to have violated the Code of Judicial Conduct, the Court of Appeals ruled the State has no duty to defend him or to reimburse him for the attorney fees he incurred in defending himself.⁷

⁶ The Supreme Court upheld the Commission's decision and its sanction. *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006).

⁷ In 1996, the Commission investigated a complaint about Justice Sanders' remarks to pro-life supporters during a rally on the state capitol campus. The Commission concluded that the justice's actions violated several provisions of the Code of Judicial Conduct and ordered that he be reprimanded and required to complete a judicial ethics course. The Supreme Court reversed the Commission's decision, holding the evidence did not establish, by the clear and convincing proof required for a restriction on his First Amendment rights, that Justice Sanders' conduct threatened or compromised the integrity or appearance of impartiality of the judiciary. *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998). Justice Sanders then sued the State for reimbursement of the attorney fees he incurred in defending himself. The superior court ruled that state law requires the attorney general to defend judges subject to disciplinary proceedings before the Commission for actions taken in their official capacity. *Sanders v. State*, No. 99-2-02349-5 (Thurston County Super. Ct. Mar. 5, 2001). Justice Sanders was awarded his costs and expenses before the Commission, as well as fees and costs incurred in the subsequent action, in the amount of \$92,479. The State did not appeal the judgment and order.

ANALYSIS

Standard of Review

The resolution of this case requires interpretation of statutory provisions. “The meaning of a statute is a question of law reviewed de novo.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

Applicable Law

The Washington Constitution provides that “[t]he attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.” Const. art. III, § 21. In accordance with the constitutional directive, the following statutes were enacted:

The attorney general shall . . . [d]efend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States.

RCW 43.10.030(3).

The attorney general shall also represent the state and all officials . . . of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials . . . of the state in matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

RCW 43.10.040.

Although the parties discuss both statutes, RCW 43.10.030 is not directly applicable here. Justice Sanders seeks attorney fees for his defense

before the Commission – not in an action or proceeding against him in state or federal court.

Statutory Interpretation

The court’s primary duty in interpreting any statute is “to discern and implement the intent of the legislature.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). In this case, the statute under which Justice Sanders seeks his fees is RCW 43.10.040.

As the Court of Appeals notes, RCW 43.10.040 was enacted in 1941 “to end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the Attorney General.” *State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977).

RCW 43.10.040 uses the term “officials.” An “official” is defined as “one who holds or is invested with an office.” *Webster’s Third New International Dictionary* 1567 (2002). When used as an adjective, “official” means “derived from the proper office or officer or authority.” *Id.* We accord a plain and ordinary meaning to terms that are not defined by a statute unless a contrary legislative intent appears. *Cowiche Canyon Conservancy v.*

Sanders (Honorable Richard) v. State, 80393-5

Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992).

To apply the statute without an official acts limitation would lead to a result the legislature obviously did not intend – requiring the attorney general to represent a judge before administrative agencies in all matters, both official and private. “Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided.” *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

There is no dispute that Justice Sanders is a state official. But the determinative question for purposes of his entitlement to representation by the attorney general is whether Justice Sanders’ ethical violations were official acts. We conclude they were not.

Justice Sanders was charged in the complaint before the Commission with ethical violations involving acts that are outside the scope of a judge’s official duties. His acts involved contact with offenders who had cases pending in his court. Representation of a judge being disciplined for ethical violations is beyond the purpose of RCW 43.10.040. Its purpose is to provide defense to an official when engaged in official acts. Justice Sanders

knew or should have known that his conduct was unethical; therefore, he is not entitled to representation.⁸

Justice Sanders argues that denying representation could leave a judge vulnerable to improper or unfounded charges of ethics violations. If a judge is wrongly charged, however, there are adequate safeguards within the Commission's procedures. Before a case may proceed to hearing, there must be a screening, a preliminary investigation, and a finding of probable cause. Comm'n on Judicial Code R. P. 17.

Justice Sanders also argues that since he prevailed on the more serious charges, he should be entitled to recover a pro rata share of his attorney fees. In our view, if a judge is found to have violated any of the canons of the Code of Judicial Conduct, there is no right to representation or reimbursement. Such is the case here.

CONCLUSION

⁸ The Supreme Court did not previously rule that Justice Sanders' ethical violations were official acts – only that the violations occurred “within the context of his judicial duties.” *Sanders*, 159 Wn.2d at 523. Likewise, the Commission did not conclude that Justice Sanders' ethical violations were official acts. The Commission considered the issue only with regard to aggravating and mitigating circumstances in order to determine the proper sanction.

We affirm the result reached by the Court of Appeals, deny Justice Sanders' request for the award of fees and costs, and remand the case to the trial court for dismissal.

AUTHOR:

Donald H. Thompson, Justice Pro
Tem. _____

WE CONCUR:

Stanley Worswick, Justice Pro Tem.

Patricia Aitken, Justice Pro Tem.

David Foscue, Justice Pro Tem.

Waldo F. Stone, Justice Pro Tem.

